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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. A-103

NANCY GAYLE SMART, *Petitioner*,

v.

CLARENCE JONES, ET AL., *Respondents*.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

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The petitioner, Nancy G. Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 6, 1974.

OPINION BELOW

No written opinion was rendered by the Court of Appeals nor by the District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 18, 1974. A timely petition for rehearing en banc was denied on June 6, 1974. An order extending time to file petition for writ of certiorari in this cause was signed by Mr. Justice Lewis F. Powell of the Supreme Court of the United States on August 28, 1974 extending the time for filing a petition for writ of certiorari to and including November 3, 1974. This petition for certiorari was filed prior to November 3, 1974. This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254(1).

Petitioner's original complaint alleged violations of privileges and immunities secured by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States; Title 42 U.S.C. Sections 1983, 1985, 1986 and 1988; and Title 28 U.S.C. Sections 1331 and 1343(3).

QUESTIONS PRESENTED

1. In federal civil rights litigation is the Court of Appeals for the Fifth Circuit required to follow settled state laws as mandated by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) i.e., (a) in Texas a Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process, and (b) in Texas "probable cause" is not a defense for an arrest without a warrant in misdemeanor crimes which do not occur at the time and place of the arrest?

2. Is the Fifth Circuit Local Rule 21 contrary to the public duty of the judiciary to state what the law is and

unconstitutional in denying due process and equal protection of the law pursuant to the Fifth and Fourteenth Amendments of the Constitution of the United States?

3. Is Art. 332(c) Tex. Rev. Civ. Stat. Ann. unconstitutional and contrary to public policy and the American Bar Association Code of Professional Responsibility for Attorneys?

4. Is an individual, who is arrested for a crime and the charges subsequently dismissed on motion by the district attorney and a court order approving same entered, entitled to have the arrest record expunged in judicial proceedings?

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes involved are lengthy and are set forth in Appendix A. The provisions are the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, Title 28 U.S.C. Secs. 1331 and 1343(3); Title 42 U.S.C. Secs. 1983, 1985, 1986, and 1988; Tex. Rev. Civ. Stat. Ann. Art. 3264(2), (3), and (6); Tex. Penal Code Arts. 336, 340, 382, and 1147; Tex. Code of Crim. P. Arts. 2.09, 2.10, 2.13, and 14.01(b); and Tex. Rules of Civ. P. Rule 15.

STATEMENT OF THE CASE

Petitioner, Nancy Gayle Smart, was arrested without a warrant on misdemeanor charges by Dallas County Deputy Sheriffs on September 11, 1972, at a time and place remote from the scene of the alleged crimes. She was handcuffed, fingerprinted, mug shot and incarcerated in jail until

freed by bond. The uncontroverted trial testimony was that she suffered severe physical injury as a result of being handcuffed behind her back for approximately two hours. She was charged with violation of (a) preventing execution of civil process, Art. 336 of the Texas Penal Code and (b) aggravated assault against a peace officer, Art. 1147, of the Texas Penal Code, in a non-attorney justice of the peace court in which she was given no opportunity to make a telephone call or have benefit of counsel. No testimony or statements were given in court before the committing magistrate in her presence.

The complaining officer Respondent, Deputy Sheriff J. W. Grandstaff, while attempting to deliver a Notice of Commissioners' Hearing in a Texas condemnation proceeding was under the mistaken belief in law that this Notice constituted a civil process, and conferred an official duty and authority upon him, which was the necessary basis for any criminal charges against Petitioner.

Petitioner filed a federal civil rights suit against Respondents on November 9, 1972 and Assistant District Attorney for Dallas County, John B. Tolle, filed an answer for the Respondents and at about the same time took over as the new prosecutor against Petitioner in the still pending criminal misdemeanor charges. Petitioner refused to plea bargain with the prosecutor and after five months of his dual role as prosecutor against her and defender against her civil rights suit, he dismissed all criminal charges and judgment of dismissal was entered on April 23, 1973.

The answer filed for the Respondents claimed Petitioner violated Art. 340 of Texas Penal Code, resisting execution

of civil process, with which Petitioner was never charged; and violated Art. 1147 of the Texas Penal Code, aggravated assault against a peace officer. Respondents claimed to have arrested Petitioner pursuant to the provisions of Art. 14.01(b) of the Texas Code of Criminal Procedure which defines the manner in which an arrest without a warrant shall be performed. Petitioner was actually charged with violation of Art. 336 of the Texas Penal Code, interference with civil process, which provides by any means not amounting to actual resistance. This was contradictory to the defense raised under Art. 340 of the Texas Penal Code, resisting execution of civil process, which provides whoever shall wilfully resist or oppose an officer in executing or attempting to execute, any process in a civil cause shall be fined not exceeding five hundred dollars. The crime charged was by means not amounting to actual resistance and the defense raised was by wilful resistance or opposition. Art. 1147 of the Texas Penal Code, aggravated assault against a peace officer, provides that an assault becomes aggravated when committed upon an officer in the lawful discharge of the duties of his office. If a Notice of Commissioners' Hearing is not a civil process, it was impossible for Petitioner to violate Arts. 336, 340, and 1147 of the Texas Penal Code as a matter of law.

Respondent J. W. Grandstaff, admitted under oath he could have arrested Petitioner at the time of the alleged criminal acts but chose to leave her which was contrary to Art. 382 of the Texas Penal Code which makes it a criminal offense for a peace officer to leave the scene where a crime has been committed in his presence and view. The District Attorney's office having full knowledge of the admitted

facts by J. W. Grandstaff has never filed any charge against him.

The evidence was uncontroverted that Petitioner was not guilty of any crime at the scene of her arrest without a warrant on San Felipe Street. There has never been any contention or suggestion that she was guilty of any felony. At all times before the trial and appellate courts, Petitioner has protested the District Attorney playing the dual roles as prosecutor of her and defender of public officials, and all requests to have the District Attorney dismissed as the attorney for the Sheriff's office were denied. The District Attorney claimed an obligation to defend the Sheriff because of Article 332(c) Tex. Rev. Civ. Stat. Ann. which was enacted approximately seven months after their entering the case. The Assistant District Attorney John B. Tolle in his argument to the trial jury stated that Petitioner had not proven her innocence even though he had dismissed the charges. He also claimed errors of the District Attorney's office in filing the charges as a defense for the Sheriff's department. This was a veiled threat that they could refile the charges again, although they never did and the statute of limitations has since barred any refilings.

The charge to the jury instructed them as to Texas Penal Code Art. 340 and 1147 both of which were irrelevant unless a civil process was involved. The trial charge as to "probable cause" indicated that such facts or evidence which would induce a reasonable person to believe an offense against the law had been committed. There was no instruction by the court that probable cause to arrest had to be as to the facts which occurred at the time and place

of the arrest. The jury made a finding there was probable cause to believe the Petitioner had committed an offense against the law but there was not any finding as to what law had been violated although the implication would be that she had violated Art. 340 (with which she was never charged) and Art. 1147 both of which were impossible to violate as a civil process was not present.

Petitioner's brief to the Fifth Circuit set forth the Texas authorities which conclusively established that in Texas a Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process. Respondents' attorney offered no contrary authority whatsoever, but after the Fifth Circuit entered a judgment without rendering an opinion the District Attorney's office offered this as their first authority for the proposition that a Notice of Commissioners' Hearing in a condemnation proceeding is a civil process. This occurred in a companion case now pending in District Court. This is completely contrary to the established State statutory and case laws decided by the Supreme Court of Texas.

The uncontroverted testimony was that Petitioner never touched or made any threats to the complaining witness J. W. Grandstaff. The charge of aggravated assault against a peace officer was without a basis in law.

On August 24, 1974 Petitioner filed in the trial court Plaintiff's Original Motion to Set Aside Judgment pursuant to Rule 60(b) F.R.C.P. because of newly discovered evidence, fraud, and misrepresentation by adverse party, and the judgment is void. Newly discovered evidence consisted of: 1. On July 29, 1974 the District Attorney's office in a companion civil rights case, No. CA 3-7646-E, Smart

v. Jones et al., requested to withdraw from representing Sheriff Jones because of a conflict of interest and a court order was entered on August 13, 1974 allowing the withdrawal. Petitioner maintained at all times in her case that there was a conflict of interest for the District Attorney to represent the Sheriff and all her efforts to force the District Attorney to withdrew were in vain. 2. Petitioner discovered subsequent to the trial of her case that the District Attorney had in his possession prior to her trial an Opinion of the Attorney General of the State of Texas, No. C-164 which set forth in unequivocal language that the Sheriff had nothing to do with condemnation proceedings until the Commissioners file their award. It is clear from this Opinion that the Sheriff has no official duty with reference to serving a Notice of Commissioners' Hearing in condemnation. This lack of official duty made it an absolute impossibility for Petitioner to violate Art. 1147 of the Texas Penal Code which was raised as a defense to her civil rights suit and this statute was presented in the court's charge to the jury. 3. Respondent J. W. Grandstaff under oath had claimed that Petitioner had attempted to "wreck him out" in a deposition given on November 29, 1973 and his attorney, Assistant District Attorney Gerald Weatherly, stated you can put me on the record that there is no such crime as "wrecking out". The court submitted to the jury for its consideration whether a crime had taken place and Respondent's own attorney has admitted no such crime exists. 4. Assistant District Attorney Gerald Weatherly acting in his official capacity and as an official of the State of Texas has presented to the trial court in a companion civil rights suit, No. CA 3-7646-E, that the Fifth Circuit's Judgment in

Petitioner's suit is authority for the proposition that a Notice of Commissioners' Hearing is a civil process. This is contrary to the settled state law of Texas and contrary to the Attorney General's Opinion directed to the District Attorney.

Petitioner contended that the newly discovered evidence and suppression of the Opinion of the Attorney General of the State of Texas entitled her to have the judgment of the trial court set aside pursuant to Rule 60(b) F.R.C.P. Petitioner was deprived of a fair trial by allowing the District Attorney to represent the Sheriff and the failure of the District Attorney to present to the court the Texas Attorney General's Opinion. Assistant District Attorney John B. Tolle in his argument to the jury stated Petitioner had not proven her innocence, although he had dismissed all charges against her. He further claimed errors of the District Attorney's Office as a defense for the Sheriff.

The Federal District Court Judge, the Honorable Sarah T. Hughes, refused in orders entered on September 3rd and 9th, 1974 to set aside the judgment entered against Petitioner on October 19, 1973.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE U.S. SUPREME COURT AND FOLLOWED BY THE OTHER COURTS OF APPEALS IN THE ERIE RAILROAD CO. V. TOMPKINS DOCTRINE AND DEFEATED PETITIONER'S CIVIL RIGHTS.

It is the duty of the judiciary to follow the substantive

law of a state as decided by its highest appellate court. The settled state law is the law of the federal court. In Texas the settled state law is: (1) A Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process. (2) An arrest without a warrant for a misdemeanor must occur at the time and place the misdemeanor occurs. (3) Probable cause is not a defense to an arrest without a warrant for a misdemeanor in which it is uncontroverted no crime occurred at the time or place of the arrest.

Respondent Deputy Sheriff J. W. Grandstaff's sole and only purpose during his encounter with Petitioner was to deliver a Notice of Commissioner's Hearing to her fiancé, now her husband, Don M. Smart. He was mistaken as a matter of law in believing this Notice was a civil process or that he had any official duty to perform in regard to this Notice.

Petitioner has raised at every stage of this proceeding including County Criminal Court No. 2, Federal District Court, and the Court of Appeals for the Fifth Circuit that a Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process. If this is true she was entitled to a judgment in her favor for violation of her civil rights as a matter of law. The only basis for the criminal charges against her was based on a civil process and the official duty thereunder. The criminal charges of preventing execution of civil process without force, Art. 336 of the Texas Penal Code and aggravated assault against a peace officer, Art. 1147 of the Texas Penal Code were patently in conflict and impossible as a matter of law if there was not a civil process creating an official duty. The Notice of

Commissioners' Hearing is issued by non-judicial Special Commissioners at the administrative stage of "quick take" condemnation proceedings in Texas. This Notice on its face is not styled the State of Texas, nor directed to any Sheriff or Constable nor attested by a clerk with the seal of the court impressed thereon as required by Rule 15 of the Texas Rules of Civil Procedure. The Sheriff's department made a return on the Notice approximately 60 days after its delivery. The particular Notice in this cause was void as a matter of law in that the date on which it was delivered did not allow ten days notice exclusive of the date of delivery and the date of hearing as required by the statute by whose authority it arose, Art. 3264(6) of Tex. Rev. Civ. Stat. Ann., which further provides that the Notice may be served by anyone competent to testify. The Notice was merely an invitation for the condemnee to appear at a hearing in which the Commissioners had only the power to determine the question of damages. Until an appeal is made to a judicial tribunal by the condemnor or the condemnee, the proceeding is purely administrative. The Special Commissioners are not magistrates (Art. 2.09 of the Texas Code of Criminal Procedure) and could not issue a process (Art. 2.10 of the Texas Code of Criminal Procedure). There was no duty or power of the Special Commissioners to issue lawful process (Art. 2.13 of the Texas Code of Criminal Procedure).

The Dallas County District Attorney had Opinion No. C-164 of the Attorney General of the State of Texas directed to him in which it was set forth in part that the Sheriff has nothing to do with the condemnation proceeding until the

Special commissioners file their award.

Opinion No. C-164

"1. The Petition or Statement of Condemnation is filed with the County Judge who appoints the Commissioners. (Article 3264, Sec. 2). Neither the Judge, Clerk, nor Sheriff has anything whatever to do with the proceeding thereafter until the Commissioners file their award or decision with the Judge as provided by Article 3265(5)."

The Supreme Court of the State of Texas has said that an Attorney General's Opinion is entitled to great weight and should be followed unless the court is convinced it is wrong (*San Antonio Junior College District vs. Daniel* 206 S.W.2d 995).

The case authorities have uniformly held that the Notice of Commissioners' Hearing is issued from a purely administrative proceeding and is not issued from a court or from a civil proceeding: *Pearson v. State* 315 S.W.2d 935 (Tex. Sup. Ct. July 9, 1958, reh. den. Oct. 1, 1958); *Rayburn v. State of Texas* 356 S.W.2d 774 (Tex. Sup. Ct. April 25, 1962, reh. den. May 23, 1962); *Rose v. State of Texas* 497 S.W.2d 444 (Tex. Sup. Ct. June 27, 1973, reh. den. July 25, 1973); *Dickey v. City of Houston* 501 S.W.2d 293 (Tex. Sup. Ct. Nov. 7, 1973, reh. den. Dec. 5, 1973). At no time in this proceeding have Respondents offered any authority whatsoever that a Notice of Commissioners' Hearing is a civil process.

It was a plain error of law for the trial court to suggest to the jury a violation of Arts. 340 and 1147 of the Texas Penal Code as it was impossible as a matter of law for Petitioner to have violated these statutes. To so charge the jury constituted a plain error of law as this shifted the burden

of proof to Petitioner to establish her innocence of non-existent crimes. This same trial judge was overruled on this same point by the Fifth Circuit in *Sheppard Federal Credit Union vs. Palmer*, 408 F.2d 1369 (1968) in which it was pointed out that a federal court must abide by the state law as it is, not as the court wishes it might be.

The District Attorney in defending the Sheriff and his Deputies against Petitioner's claim that her civil rights had been violated, pleaded that Petitioner was guilty of violating Art. 340 of the Texas Penal Code and Art. 1147 of the Texas Penal Code. Petitioner was never charged at anytime with a violation of Art. 340; yet, she was called upon to defend against such a charge to enjoy her civil rights. The District Attorney dismissed the charge on Art. 1147 and yet sought to claim a criminal violation and force Petitioner to defend against such dismissed charge. The District Attorney also dismissed the charge on Art. 336 and did not consider it of sufficient merit to be pleaded as a defense.

Even in the brief of the Appellees in the Court of Appeals for the Fifth Circuit filed by the District Attorney, the demand was made for the first time for the Petitioner to prove her innocence of an alleged violation of Arts. 1138 and 1139 of the Texas Penal Code and 6701(d) Tex. Rev. Civ. Stat. Ann.

This presents squarely the question of whether to enjoy the protection of 42 U.S.C. §1983 the Petitioner is called upon as a matter of law to prove her innocence against every criminal statute the District Attorney wishes to plead in behalf of his clients. The fact remains that Petitioner was charged before the magistrate with a violation of Arts. 336

and 1147. No other charges have ever been filed, nor has the District Attorney sought to prosecute the Petitioner on any other charges. These charges and these alone represent the basis of the unlawful arrest and the false imprisonment of Petitioner. These are the charges which violated her civil rights.

The civil rights of Petitioner should not, and do not, rest upon her ability to prove her innocence of every charge the District Attorney can plead in a civil suit. The fundamental rule of law that Petitioner is innocent until proven guilty by the established rules of criminal law are in this manner totally abrogated and set at naught thus rendering her civil rights more illusory than real.

The trial court presented "probable cause" as a defense in its charge to the jury. Petitioner presented to the trial court that *Rodriguez vs. State* 172 S.W.2d 502, is still controlling:

> "To justify an arrest without warrant the offense must amount to a breach of the peace, and must be actually committed in the presence of the person making the arrest, and arrest must be made when an offense was committed."

In Petitioner's hearing for a summary judgment before the trial court, Assistant District Attorney John B. Tolle, stated that Article 14.01(b) of the Code of Criminal Procedure has materially changed the rule as to when an arrest will be made without a warrant. However, Article 14.01(b) of the Texas Code of Criminal Procedure was enacted in 1967 and the Fifth Circuit in 1968 in *Phelper vs. Decker*, 401 F.2d 232 (1968) stated on page 236 in footnote 9:

> ". . . A brief check shows Texas law apparently to be that the

> officer must make the arrest immediately after the offense for a misdemeanor crimes, cf. *Rodriguez v. State* 1943, 146 Tex. Cr. R. 206, 172 S.W.2d 502."

From the same case on page 238 in footnote 21:

> "Prior to 1967, peace officers in Texas could arrest a person without a warrant for a misdemeanor only if it was classified as being against the public peace. Tex. C. Cr. Pro. Ann. Art. 1401 (Sup. 1967) (emphasis added)."

Art. 14.01(b) did not change the rule in Texas that an arrest without a warrant for a misdemeanor must be made immediately. In Texas "probable cause" is not a defense to an arrest without a warrant for a misdemeanor unless that arrest is made at the time and place of the alleged incident. To raise "probable cause" as a defense for Respondent was a plain error of law and is contrary to *Erie R. Co. vs. Tompkins*, 304 U.S. 64 (1938). It was uncontroverted that Petitioner was arrested without a warrant for a misdemeanor at a different time and place from the alleged incident. To refuse to apply settled state laws is a miscarriage of justice.

It was necessary to make two plain errors of law in order to defeat Petitioner's civil rights suit. Without both the error that a Notice of Commissioners' Hearing is a civil process and the error that "probable cause" is a defense to an arrest without a warrant in a misdemeanor crime occuring at a different time and place from the arrest, Petitioner was entitled to a judgment in her favor as a matter of law.

2. FIFTH CIRCUIT LOCAL RULE 21 DEPRIVES LITIGANTS OF ANY MEANINGFUL APPELLATE REVIEW AND IS CONTRARY TO THE JUDICIAL DUTY TO SAY WHAT THE LAW IS.

Local Rule 21 of the Fifth Circuit is designed to sum-

marily dispose of large amounts of litigation with the least amount of work. This is to be reserved for cases without precedential value. It should have no application whatsoever in decisions which overturn settled state law as the courts have a duty to say what the law is. No opinion was rendered by either the trial court nor the Fifth Circuit. It is perfectly clear from the authority presented by Petitioner that the settled law of Texas is that a Notice of Commissioners' Hearing is not a civil process. To affirm without a written opinion a judgment in which a contrary finding is necessary, denies an appellant of any meaningful appellate review. The inherent danger of the Rule is that it allows invideous discrimination against individuals by summarily disposing of cases in which plain errors of law are made but that individual would not be able to use the new holding in companion or subsequent cases.

It was a plain error of law to present probable cause as a defense for Respondents in a misdemeanor occuring at a different time and place than the alleged crime as this has no application whatsoever as a defense for a misdemeanor arrest without a warrant at a different time and place. To present a jury with this charge could only confuse them and was contrary to settled state law. To summarily dispose of a case in which this charge was presented would be to present a plain error of law as a defense but to deny it to other litigants who might desire such a holding.

The Fifth Circuit in *N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970) indicated that Local Rule 21 was devised because of the case load and also that an opinion would be of no precedential value.

Petitioner's case rendered under Local Rule 21 is now being used by the State of Texas acting through it's District Attorney in a companion case that a Notice of Commissioners' Hearing is a civil process. The inherent dangers of summarily disposing of civil litigation in which time is not as crucial as in criminal matters and the U.S. Supreme Court's inability to review any significant number of writs of certiorari would suggest that to summarily dispose of an appellant's appeal would often deny him any meaningful appellate review. It is further suggested that this Local Rule 21 for all practical purposes allows the Court of Appeals to take a discretionary adjudication as to any meaningful review. Such discretion is reserved to the U.S. Supreme Court and summary disposition of a case is not within the proper province of the Court of Appeals.

In summarily denying the appeal of Petitioner the Court of Appeals, Fifth Circuit, thereby made a pronouncement of law without stating the legal conclusion that the bar and public may know the law concerning the adjudication. The legal conclusion in this case was that a Texas peace officer with a Notice of Commissioners' Hearing in a condemnation proceeding is acting in an official capacity and performing an official duty. This legal conclusion, for it was the legal grounds on which Petitioner was denied recovery for violation of her civil rights, makes a statute of the State of Texas mean one thing in the federal courts and a different and opposite thing in the courts of the State of Texas.

The finding below by necessary implication that the administrative condemnation procedure of Arts. 3264-3267 Tex. Rev. Civ. Stat. Ann. is a civil cause makes said statutes

subject to the additional constitutional attack as violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. No notice of the filing of the petition in condemnation is provided to be made to the property owner. No opportunity to be heard by the tribunal as to questions of law or fact, save the amount of damages to be determined by commissioners selected ex parte, is accorded the property owner which is in total violation of the constitutional rights of due process. *Mitchell v. W. T. Grant Co.*, ... U.S. ....., 40 L.Ed.2d 406 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

These statutes are before this Court on an appeal from the judgment of a Three Judge Court from the Northern District of Texas, Dallas Division, in the case of *Joiner et al. v. City of Dallas.*

3. ARTICLE 332(c) OF TEX. REV. CIV. STAT. ANN. IS UNCONSTITUTIONAL BECAUSE OF DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW PURSUANT TO THE FIFTH AND THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND VOID AS CONTRARY TO PUBLIC POLICY.

Art. 332c, Acts 1973, 63rd Leg., p. 1765, ch. 644, eff. June 16, 1973 provides:

> "Sec. 2. In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall represent the official or employee of the county

> if the suit involves any act of the official or employee while in the performance of public duties."

To allow district attorneys to use the power and prestige of their office in defending public officials in civil rights litigation presents an inherent conflict of interest in which the district attorney has the duty to prosecute criminal violations whether they are occasioned by public officials or private individuals. When the district attorney defends public officials who are accused of violating a private individual's civil rights, the district attorney would be placed in the position of prosecuting his client he is defending, if it were proven the public official had violated the individual's civil rights. The obvious reluctance to prosecute his own client at times results in a denial of equal protection of the law.

The 1970 American Bar Association Code of Professional Responsibility, which provides a public policy for the ethical conduct of counsel, was adopted by the State Bar of Texas in essentially the same form.

The A.B.A. Code of Professional Responsibility at p. 25 at EC 7-14 provides:

> "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair."

Assistant District Attorney John B. Tolle continued prosecution of Petitioner for approximately five months while at the same time defending against her civil rights suit. When Petitioner attempted to obtain discovery in federal court as to the criminal allegations, Mr. Tolle claimed an attorney-client privilege with the complaining criminal witness.

The A.B.A. Code of Professional Responsibility at p. 34 at DR 8-101(A)(2) provides:

> "A lawyer who holds public office shall not use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

Assistant District Attorney John B. Tolle in his final argument to the jury stated that Petitioner had not proven her innocence and there was no evidence except that the district attorney had filed the charges wrong and they can be refiled.

The A.B.A. Code of Professional Responsibility at p. 28 provides:

> "DR 7-105 Threatening Criminal Prosecution.
> (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Assistant District Attorney John B. Tolle in his final argument to the jury stated there was no evidence of anything except the charges were filed wrong, they can be refiled over. This was a threat that the district attorney would refile the charges. The statute of limitations for refiling has since run without refiling, so the only conclusion that could be made was that the threat to refile was not made in good faith, but only made solely to obtain an advantage in a civil matter.

The uncontroverted testimony of Respondent Deputy Sheriff J. W. Crandstaff was that if Petitioner was guilty of any crime she committed it on Lake Highlands Drive and he could have arrested her at that time. If the Assistant District Attorney John B. Tolle was correct that Petitioner had violated Arts. 340 and 1147 of the Texas Penal Code,

which would have occurred on Lake Highlands Drive, then he had a duty to charge J. W. Grandstaff with violation of Art. 382, the only conclusion that can be drawn is that the District Attorney violated his duty to prosecute for violations of law or that his claim that Petitioner had violated Arts. 340 and 1147 was made solely for the defense of the Deputy Sheriff and it was not made in good faith. Therein, lies the inherent conflict of interest in which a public official, the district attorney, uses the power and prestige of his office to defeat the civil rights of a private individual. It is contrary to public policy to allow such an official to be both the prosecutor against a civil rights litigant and at the same time be a defender against their just claims.

4. IS AN INDIVIDUAL WHO IS ARRESTED AND THE CHARGES SUBSEQUENTLY DISMISSED ENTITLED TO HAVE THE ARREST RECORD EXPUNGED.

This is a national recurring problem in which computer technology has provided a heretofore non-existent technique for dispersing arrest records on a national scale. It is common knowledge that such an arrest record may have a violent and harmful effect upon an individual's ability to obtain employment. Many employment forms including the California Bar Association's Bar Application merely inquire as to an arrest record rather than a conviction or disposition of the case. Most of the computer files of arrest records do not even provide for follow up information as to the disposition of the case and certainly do not provide that the arrest record be removed from the computer files if the case were dismissed. Petitioner's cause is a perfect

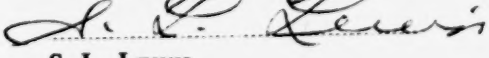
example of an individual charged with a crime which could not exist as matter of law. The District Attorney was unwilling to present the charges to a court for a determination of guilt. To refuse expungement of an arrest record denies Petitioner due process and equal protection of the law pursuant to the Fifth and Fourteenth Amendments in jeopardizing, compromising and damaging her good reputation as a law abiding citizen without an opportunity to be heard or an opportunity to expunge the arrest record.

CONCLUSION

Settled state laws should be followed by the Court of Appeals as mandated by Erie Railroad Co. v. Tompkins. Fifth Circuit Local Rule 21 is contrary to a public duty to say what the law is and provide a meaningful appellate review. District attorneys defending public officials against individuals claiming violation of their civil rights is a patent conflict of interest. An individual guilty of no crimes should be restored to at least his previous position by having an arrest record expunged.

These reasons constitute recurring problems of national significance and therefor writ of certiorari should issue to review judgment and opinion of the Fifth Circuit.

Respectfully submitted,



S. L. Lewis
5614 Richmond Street
Dallas, Texas 75206

Don M. Smart
10611 Garland Road
Dallas, Texas 75218

CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on October 29, 1974, addressed to John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202 and Gerald Weatherly, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202 counsel of record for Respondents.

S. L. Lewis

S. L. Lewis

APPENDICES

APPENDIX A: *CONSTITUTIONAL PROVISIONS AND STATUTES*

United States Constitution, Amendment IV, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V, in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Rules of Appellate Procedure Fifth Circuit Local Rule No. 21.

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter

submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Title 28, United States Code, in pertinent part:

§ 1331. Federal question

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, in pertinent part:

§ 1343(3). Civil Rights and elective franchise

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 42, United States Code, in pertinent part:

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code, in pertinent part:

§ 1985. Conspiracy to interfere with civil rights Preventing officer from performing duties

Depriving perons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injury any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42, United States Code, in pertinent part:

§ 1986. Action for neglect to prevent conspiracy

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented, and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the

action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

Title 42, United States Code, in pertinent part:

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Texas Revised Civil Statutes Annotated, with respect to eminent domain, in pertinent part:

Article 3264. The exercise of the right of eminent domain shall in all cases be governed by the following rules:

2. When such statement is filed with the county judge, he shall, either in term time or vacation, appoint three disinterested freeholders of said county as special commissioners to assess said damages, giving preference to those that may be agreed upon between the parties.

3. The commissioners shall be sworn to assess said damages fairly and impartially and in accordance with law.

6. The notices shall be served upon the parties at least ten (10) days before the day set for the hearing, exclusive of the day of the service, and may be served by any person competent to testify, by delivering a copy of such notice to the party, his agent or attorney.

Texas Revised Civil Statutes Annotated, in pertinent part:

Article 332(c). Representation of county officials and employees by district, county or private attorneys

§2. In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall represent the official or employee of the county if the suit involves any act of the official or employee while in the performance of public duties.

Texas Penal Code, in pertinent part:

Article 336. Preventing execution of civil process

Whoever shall prevent or defeat the execution of any process in a civil cause, by any means not amounting to actual resistance, but which are calculated to prevent the execution of such process, shall be fined not exceeding five hundred dollars; evading the execution of such process is not an offense under this article.

Texas Penal Code, in pertinent part:

Article 340. Resisting execution of civil process

Whoever shall wilfully resist or oppose an officer in executing or attempting to execute, any process in a civil cause shall be fined not exceeding five hundred dollars; and if arms be used in such resistance, the punishment shall be doubled.

Texas Penal Code, in pertinent part:

Article 382.

If any justice of the peace, sheriff or other peace officer shall wilfully neglect to return, arrest or prosecute any person com-

mitting a breach of the peace or other crime or misdemeanor which has been committed within his view or knowledge, or shall wilfully absent himself from any place where such crime or misdemeanor is being committed, or is about to be committed, for the purpose of avoiding seeing or having a knowledge of the same, he shall be fined not less than seventy-five nor more than five hundred dollars.

Texas Penal Code, in pertinent part:

Article 1147. An assault or battery become aggravated when committed under any of the following circumstances;

(1) When committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty.

Texas Code of Criminal Procedure

Article 2.09. Who are magistrates

Each of the following officers is a magistrate within the meaning of this Code: The judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Court, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns.

Texas Code of Criminal Procedure

Article 2.10. Duty of Magistrates

It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.

Texas Code of Criminal Procedure

Article 2.13. Duties and powers

It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use

all lawful means. He shall in every case where he is authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime. He shall execute all lawful process issued to him by any magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and be tried.

Texas Code of Criminal Procedure

Article 14.01(b).

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Texas Rules of Civil Procedure

§ 1. Rule 15. Writs and Process

The style of all writs and process shall be "The State of Texas;" and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any sheriff or any constable within the State of Texas, shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon; and the date of issuance shall be noted thereon.

APPENDIX B:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 73-3879

Summary Calendar*

NANCY GAYLE SMART,

Plaintiff-Appellant,

versus

CLARENCE JONES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(April 18, 1974)

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

NO. 73-3879

Summary Calendar*

D. C. Docket No. CA-3-6478

NANCY GAYLE SMART,

Plaintiff-Appellant,

versus

CLARENCE JONES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 18, 1974

Issued as Mandate: June 14, 1974

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk
600 Camp Street
New Orleans, La. 70130

June 6, 1974

TO ALL COUNSEL OF RECORD

Re: 73-3879 SMART V. JONES, ET AL

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Annie G. Parent
Deputy Clerk

cc: Mr. S. L. Lewis
Mr. Don M. Smart
Mr. John B. Tolle